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No. 90-459

In the Supreme Court of the United States

OCTOBER TERM, 1990

PHYLLIS SCHMIDT AND EARL SCHMIDT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, when subject matter jurisdiction over petitioner's FTCA suit was challenged by the government, petitioner had the burden of establishing that the district court had jurisdiction.

2. Whether the procedures followed by the FAA in sending a letter denying petitioners' administrative claim constituted a certified mailing within the meaning of 28 U.S.C. 2401(b).

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A13-A17) is reported at 901 F.2d 680. The decision of the district court (Pet. App. A8-A11) and the recommendation of the magistrate (*id.* at A3-A7) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1990. A petition for rehearing was denied on June 8, 1990 (Pet. App. A18). The petition for a writ of certiorari was filed on September 6,

1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Phyllis Schmidt, a flight attendant, was injured in 1983 when the Ozark Airline plane on which she was flying struck a snow removal vehicle after landing in Sioux Falls, South Dakota. Mrs. Schmidt and her husband, petitioner Earl Schmidt, filed a claim for damages with the Federal Aviation Administration on November 1, 1985. In their claim, petitioners alleged that the air traffic controllers in Sioux Falls were negligent in failing to instruct the driver of the snowblower to leave the runway before granting the Ozark flight clearance to land. Pet. App. A14.

The FAA denied petitioners' claim in a letter dated Wednesday, November 19, 1986. Petitioners' attorney signed the receipt for the letter five days later, on Monday, November 24. Petitioners filed their complaint in federal district court, alleging jurisdiction under the Federal Tort Claims Act, on May 21, 1987. Pet. App. A10, A14.

2. The government moved to dismiss petitioners' complaint for lack of subject matter jurisdiction, arguing that it was untimely under 28 U.S.C. 2401(b). Section 2401(b) provides that an action against the United States under the FTCA must be commenced "within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." In their opposition to the government's motion, petitioners argued that the letter had been mailed on Friday, November 21, 1986, and that the complaint had been timely filed exactly six months later. Pet. App. A14. Initially, the district court ordered that

the motion would be treated as one for summary judgment and directed the parties to submit affidavits, other evidentiary materials, and briefs. *Id.* at A1-A2. However, the court subsequently clarified its order, indicating that summary judgment procedures were inappropriate in this case; that petitioners had the burden of establishing jurisdiction; and that the court had directed the parties to submit evidentiary materials in order to permit "a proper determination as to whether it has jurisdiction in this matter." *Id.* at A8-A9.

a. The motion was referred to a magistrate. The magistrate found that the letter had been signed on November 19, 1986, and placed in an envelope with a green receipt card attached. Pet. App. A4. The letter, the magistrate further found, was placed on a shelf in the FAA office for pickup by the FAA's private contractor, DDD Company, either on Wednesday, November 19, or Thursday, November 20. After being picked up by DDD, the letter was logged into a DDD log book by name and address on November 20. *Id.* at A5. A DDD Company assistant supervisor testified in a deposition that a United States Postal Service employee "always" picked up mail from DDD Company after 4:15 p.m. each day. *Id.* at A6. The magistrate ruled, nevertheless, that the Post Office's pickup "*might* have been missed on November 20, 1986," and that "it is possible" that a letter received on Monday, November 24, could have been mailed on Friday, November 21. *Ibid.* Concluding that this degree of uncertainty barred a ruling in the government's favor, the magistrate recommended that the government's motion be denied. *Id.* at A6-A7.

b. The district court upheld the government's objection to the magistrate's recommendation and

granted the government's motion to dismiss for lack of subject matter jurisdiction. The court observed that "when the mailing of the letter actually occurred is not clear." Pet. App. A10. The court held, however, that "[w]hen a defendant challenges jurisdiction, the burden is upon the plaintiff of establishing the jurisdictional facts" and that petitioners had not carried that burden because they had failed to show that the letter had not been mailed until November 21. *Ibid.*

3. The court of appeals affirmed. Pet. App. A13-A17. Based upon its review of the evidence, the court observed that the Postal Service "most likely did receive the denial letter on November 20, 1986." *Id.* at A16. In any event, the court continued, petitioners "bore the burden of establishing subject matter jurisdiction once the Government challenged it" and "the evidence fails to establish [petitioners'] contention that the denial letter was not mailed until November 21, 1986." *Ibid.*

The court of appeals also rejected petitioner's claim that, in not obtaining a dated receipt of mailing from the Postal Service, the FAA had failed to comply with the statutory requirement that denial letters be sent by certified mail. Pet. App. A17.[1] The court explained that Postal Service regulations defining certified mail do not require a dated receipt of mailing and that customers sending large quantities of certified mail are allowed to use logbooks, in which they record the number and date of each mailing, as their receipts. *Ibid.*; see Domestic Mail Manual 912.45, at 486

[1] There is no dispute that the FAA received a signed receipt reflecting petitioners' attorney's acceptance of the letter. Pet. App. A10. Petitioners contend that a receipt of mailing, showing the date on which the Postal Service received the item, was also required.

(1987). Since DDD followed those procedures in mailing the letter denying petitioners' claim, the court held that the mailing was by certified mail and thus commenced the running of Section 2401(b)'s period of limitations. Pet. App. A17.

ARGUMENT

1. Petitioners contend that the record gave rise to a material issue of fact, requiring denial of the government's motion, as to the date that their denial letter was mailed—*i.e.*, received by the Postal Service. The court of appeals correctly held that Fed. R. Civ. P. 56 was inapplicable to petitioners' motion, and in any event, petitioners presented no evidence giving rise to a triable issue of fact.

The United States is immune from suit unless it has consented to be sued, *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941), and it may define the terms and conditions upon which it is subject to suit, *Honda* v. *Clark*, 386 U.S. 484, 501 (1967); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). In 28 U.S.C. 2401(b), Congress has provided that an FTCA action against the United States must be filed "within six months after the date of mailing, by certified or registered mail, of notice of final denial of the [administrative] claim by the agency to which it was presented." Unless suit is filed within this six-month period, the district court lacks jurisdiction. See *Charlton* v. *United States*, 743 F.2d 557, 558 (7th Cir. 1984).

Under Section 2401(b), petitioners' suit was timely if, and only if, the letter denying their claim was mailed on or after November 21, 1986. Consequently, petitioners bore the burden of establishing that fact. As this Court explained in *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936):

> If [the plaintiff's] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismised, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.

See also *Bingham* v. *Cabot*, 3 U.S. (3 Dall.) 382, 383-384 (1798); *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 546 n.8 (1986).[2]

When jurisdiction is placed in question, the district court should ordinarily determine its power to hear the suit before proceeding to the merits. Thus, unless the issue of jurisdiction is intertwined with the merits, the court should resolve the jurisdictional question, employing whatever procedures are appropriate, before proceeding to trial. See *Crawford* v. *United States*, 796 F.2d 924, 928 (7th Cir. 1986); *Wheeler* v. *Hurdman*, 825 F.2d 257 (10th Cir. 1987). To that end, the court is empowered to call for the submission of evidentiary materials and, if necessary, to conduct a hearing to resolve disputed issues of fact. *Land* v. *Dollar*, 330 U.S. 731, 735 n.4 (1947); *Crawford* v. *United States*, 796 F.2d at 928-

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[2] The cases on which petitioner relies (Pet. 10-11), *Satz* v. *ITT Financial Corp.*, 619 F.2d 738, 742 (8th Cir. 1980); *Miller* v. *Central Chinchilla Group, Inc.*, 494 F.2d 414, 417 (8th Cir. 1974), do not contradict these principles. Indeed, the Eighth Circuit has recognized that once jurisdiction is challenged, the burden of establishing jurisdiction is on the plaintiff. *Butts Feed Lots, Inc.* v. *United States*, 690 F.2d 669, 670 (1982). See also *Zunamon* v. *Brown*, 418 F.2d 883, 885-886 (8th Cir. 1969); *Mountaire Feeds, Inc.* v. *Agro Impex, S.A.*, 677 F.2d 651, 653 n.3 (8th Cir. 1982).

929. If a party believes that the motion raises disputed issues of fact, it should request a hearing. *Id.* at 928.

The district court heard and disposed of the government's motion in a manner consistent with these principles. When the government placed subject matter jurisdiction in issue, the district court properly called upon the parties "to submit evidence in order that the Court [might] make a proper determination as to whether it ha[d] jurisdiction in this matter." Pet. App. A9. With the benefit of all evidence submitted by both parties, the court determined that petitioners had "simply failed to establish" the fact necessary to sustain the court's jurisdiction—*i.e.*, that the final denial letter was mailed on or after November 21, 1986. *Id.* at A10.

Contrary to petitioner's contention, the standards for summary judgment motions prescribed by Fed. R. Civ. P. 56 were inapplicable to the motion. The rule that governs motions to dismiss for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), does not provide for the conversion of such motions into summary judgment motions. Further, when (as in this case) the court's jurisdiction turns on facts distinct from the merits, the use of summary judgment procedures would improperly delay the resolution of the jurisdictional issue. See, *e.g.*, *Crawford* v. *United States*, 796 F.2d at 928-929; *Moir* v. *Greater Cleveland Regional Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990); *Rogers* v. *Stratton Indus., Inc.*, 798 F.2d 913, 915-916 (6th Cir. 1986).[3] Here, the dis-

[3] Statements in some cases suggest that summary judgment procedures may be employed in ruling on motions to dismiss filed under Fed. R. Civ. P. 12(b)(1). See *Crawford* v. *United States*, 796 F.2d at 928 (citing cases that have employed those procedures); *In re Swine Flu Immunization Prods. Liab.*

trict court placed petitioners on notice that they would bear the burden of establishing jurisdiction and that it would finally resolve that question based upon the materials submitted. Petitioners have not suggested that they were deprived of the opportunity to submit any evidence that would have supported their position or that a hearing would have served any practical purpose.[4] Thus, the lower courts were justified in finally deciding the issue of jurisdiction on the basis of the record before them.

In any event, the record in this case did not give rise to a "genuine issue" (Fed. R. Civ. P. 56(c)) as to the date on which the FAA mailed the letter finally denying petitioners' claim. The basic historical facts were not disputed. The government proved the procedure under which the FAA mailed certified letters. Testimony that the Postal Service "always" picked up mail in the late afternoon (see Pet. App.

Litig., 880 F.2d 1439, 1442 (D.C. Cir. 1989). However, there is no conflict among the circuits warranting this Court's review. First, cases that have applied Rule 56 to motions to dismiss for lack of subject matter jurisdiction cannot fairly be read to suggest that a district court lacks authority to employ whatever procedures are appropriate to make a pretrial determination of its jurisdiction or that a court of appeals must review the results of those procedures as though they involve only a motion for summary judgment. Thus, those cases do not cast doubt on the procedures employed here. Second, as we demonstrate, petitioners did not submit evidence giving rise to an issue of fact requiring trial under Rule 56; application of Rule 56 standards would not justify reversing the judgment in this case.

[4] Although the district court initially stated that the government's motion would be treated as one for summary judgment (Pet. App. A1), it subsequently clarified its intention to employ procedures "similar to the handling of a summary judgment motion" to make a final determination of its jurisdiction (*id.* at A9).

A6) justified the conclusion—even in the absence of eyewitness testimony as to this particular mailing—that the letter to petitioners had been picked up on the afternoon of November 20, 1986. See Fed. R. Evid. 406. As the party bearing the burden of proving jurisdiction, petitioners would have had the burden, even under Rule 56, of introducing some evidence from which a trier of fact could have concluded that the letter was not mailed until November 21. See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). Petitioners failed to do so. They submitted no evidence tending to prove that the FAA's regular procedure had not been followed on November 20, and their attorneys' receipt of the letter on November 24 was just as consistent with its having been mailed on November 20 as on November 21. See Pet. App. A19-A20. A trier of fact could not find for petitioners on the basis of unsupported speculation that regular procedures had not been followed on this particular occasion.

2. Petitioners also suggest that the letter denying their administrative claim was not sent by "certified mail" within the meaning of 28 U.S.C. 2401(b), since the FAA did not obtain an individual receipt of mailing showing the date that the letter was received by the Postal Service. Pet. 13-18; see note 1, *supra*.

As petitioners note, the United States Postal Service Regulations define certified mail as "a service that provides a mailing receipt to the sender and a record of delivery at the office of address." 39 C.F.R. Pt. 3001, Subpt. C, App. A § 5.010. The procedures used by the FAA in sending its denial letter to petitioners were fully consistent with those standards. The agency attached a "green receipt card" that "indicate[d] that the letter was to be sent by certified mail" and which was later "signed by [petitioners']

attorney when the letter was received." Pet. App. A9-A10. That receipt provided "a record of delivery at the office of address." As the court of appeals noted, an individual receipt of mailing is not required for certified mail. When three or more letters are mailed at one time, the Domestic Mail Manual allows senders to use a "mailing book" furnished by the Post Office (Postal Service Form 3877) to create the requisite receipt of mailing. See Domestic Mail Manual 912.45, at 486 (1987).[5] The entry in DDD's logbook for the denial letter constituted a mailing receipt for purposes of the Postal Service's definition of certified mail. The procedures used to send FAA's denial letter satisfied the Postal Service definition of "certified mail"; there is no basis for construing 28 U.S.C. 2401(b) to require any different procedure.

Petitioners provide no support for their contention (Pet. 14-15) that Section 2401(b) should be construed to require a mailing receipt showing the date that an article was received by the Postal Service. Nothing in the Postal Service's definition of "certified mail" supports such a requirement. To the contrary, postal regulations regarding certified mail provide that a receipt showing the date of mailing is optional:

> *If requested by the mailer*, the time of acceptance by the Postal Service will be indicated on the receipt.

39 C.F.R. Pt. 3001, Subpt. C, App. A § 5.021 (emphasis added).[6]

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[5] The Postal Service has incorporated the Domestic Mail Manual by reference in its regulations. See 39 C.F.R. 111.1.

[6] See also Domestic Mail Manual 912.44*d* (procedures to be followed if the sender desires a postmarked mailing receipt);

As petitioners concede, their contention raises an issue "of first impression" on which there is no conflict among the courts of appeals. Pet. 13. Moreover, the decisions on which petitioners rely are inapposite. In *Lindemood* v. *Commissioner of Internal Revenue*, 566 F.2d 646 (9th Cir. 1977), a case that petitioners characterize as involving "[a] similar situation" (Pet. 14), the Ninth Circuit had no occasion to address the definition of certified mail. Rather, the court applied a statute, 26 U.S.C. 7502, and detailed Treasury Department regulations regarding proof of the date of filing of petitions for redeterminations of tax deficiencies with the Tax Court. 566 F.2d at 647-649. Those regulations and that statute are irrelevant to this case. In *Johnson* v. *United States*, 652 F. Supp. 407 (E.D. Va. 1987), the government sent a denial letter by first-class mail (without even attempting to use registered or certified mail) and thus clearly failed to meet the requirements of 28 U.S.C. 2401(b). And in *Miller* v. *United States*, 741 F.2d 148 (7th Cir. 1984), the court concluded that a letter sent by the agency was not a final denial of the plaintiff's claim. There is no similar issue here.

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id. at 912.44*e* (procedures to be followed if a postmarked receipt is not desired).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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